NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FRANCISCO VILLEGAS, Petitioner, v. CHARLIE WARREN, et al., Respondents.	Civil Action No. 12-4457 (RMB) **OPINION**

This matter comes before the Court upon Petitioner's § 2254 petition, see Docket Entry No. 1, which is being read in light of his two latest motions. See Docket Entries Nos. 24 and 26.

Petitioner is a state inmate currently confined at the New Jersey State Prison, New Jersey. He has been challenging his conviction rendered in 1995 by the Superior Court of New Jersey, Law Division. See Docket Entry No. 1, at 2. In fact, Petitioner already challenged the very same conviction in Villegas v. Hendricks ("Villegas-I"), Civ. Action No. 04-3222 (RMB) (D.N.J.) (filed on July 6, 2004; term. on September 27, 2006). There, this Court dismissed his § 2254 application as untimely, while noting that: (a) Petitioner was asserting actual innocence;[1] and

[1] Specifically, Petitioner asserted that "newly discovered evidence arose in February 1997, when [a certain person] visited Petitioner in prison and told him that . . . her husband (and Petitioner's friend) had confessed to the murder [underlying Petitioner's conviction] three weeks before he died on July 15, 1995." Villegas-I, Docket Entry No. 19, at 15.

(b) the Court of Appeals was yet to rule on "whether a showing of actual innocence [was] grounds for equitable tolling." Villegas-I, Docket Entry No. 19, at 15. Employing, therefore, the umbrella test set forth in House v. Bell, 547 U.S. 518 (2006), the Court addressed the facts of Petitioner's conviction and this newly discovered evidence, as adjudicated on the merits by the state courts during Petitioner's post-conviction review ("PCR") proceedings, and found that Petitioner failed to demonstrate actual innocence within the test posed in House. See Villegas-I, Docket Entry No. 19, at 18 ("Significantly, Petitioner's newly discovered evidence does not call into question the eyewitness testimony of [the witness] who testified that he was six inches away from Petitioner's face when Petitioner shot his father"). Thus, the Court found equitable tolling unwarranted, dismissed the Villegas-I petition as untimely and declined to issue a certificate of appealability. See id., Docket Entry No. 20.

Petitioner appealed, and the Court of Appeals also denied him certificate of appealability. See id., Docket Entries Nos. 22 and 24; accord Villagas v. Hendricks, USCA Index No. 06-4499.

Four years passed by. On July 5, 2012, the Clerk received Petitioner's another § 2254 application; that submission gave rise to the matter at bar. See Instant Matter, Docket Entry No. 1. Petitioner followed that application with numerous motions, e.g., his motion for an order to show cause as to why habeas

relief should not be granted, see id., Docket Entry No. 2, motion for a "default judgment," see id., Docket Entry No. 5, a document titled, "Motion for Lack of Jurisdiction and Failure to State a Claim Upon [Which] Relief Can Be Granted," id., Docket Entry No. 10 (effectively seeking a "default judgment" on the grounds that Respondents did not answer his petition, even though Respondent were not ordered to answer it), another document titled, "Amended Motion for Relief from Orders," yet another document titled, "Motion for Rehearing," id., Docket Entries Nos. 12 and 12-1, one more document titled "Motion of No Formal Opposition," id. Docket Entry No. 14 (seeking, again, a "default judgment" on the grounds that Respondents did not answer his petition in this matter, even though they were never ordered to do so), etc. All these motions were denied. See id., Docket Entry No. 21.

Upon that development, Petitioner filed two new motions; they are the ones at bar. One concedes that Petitioner is aiming to file a second/successive § 2254 application; therefore, it requests transfer of this application to the Court of Appeals. See id., Docket Entry No. 24. The other asserts that all submissions filed by Respondents should be stricken from the docket on the grounds of the Federal Rules of Civil Procedure 10(c) and 12(b). See Docket Entry No. 26.[2]

[2] The Federal Rules of Civil Procedure govern civil actions, while the Habeas Rules govern habeas actions, as the one at bar. Thus, Petitioner's motion seeking to strike Respondents'

A prisoner may not file a second/successive § 2254 petition unless he first obtains an order from the appropriate circuit court authorizing the district court to consider the motion. See 28 U.S.C. § 2244(b)(3)(A). Absent such authorization, the district court lacks jurisdiction to address the merits of such a petition. See 28 U.S.C. § 2244(b)(4); Robinson v. Johnson, 313 F.3d 128, 139 (3d Cir. 2002) ("When a second or successive habeas petition is erroneously filed in a district court without the permission of a court of appeals, the district court's only option is to dismiss the petition or transfer it to the court of appeals pursuant to 28 U.S.C. § 1631"); United States v. Enigwe, 1998 U.S. Dist. LEXIS 15149 (E.D. Pa. Sept. 28, 1998)("AEDPA's. . . provision allocates subject-matter jurisdiction to the court of appeals by stripping the district court of jurisdiction over a second or successive habeas petition unless and until the court of appeals has decreed that it may go forward")(citations omitted). Therefore, the petition filed in the instant matter must be dismissed for lack of subject matter jurisdiction.

However, since nothing in the language of Section 2244(b)(3)(A) prevents any litigant, Petitioner included, from making an application for leave to file a second/successive § 2254 petition, this Court has no reason to deny Petitioner's request to construe his petition filed in the instant matter as

---

submissions will be dismissed.

Petitioner's application for leave from the Court of Appeals erroneously filed in this District. Correspondingly, the Court has no basis to deny "transfer[ing] it [accordingly,] pursuant to 28 U.S.C. § 1631." Johnson, 313 F.3d at 139.[3]

For the foregoing reasons, Petitioner's motion, docketed as Docket Entry No. 26, will be denied, while Petitioner's other motion, docketed as Docket Entry No. 24, will be granted.

This Court's prior order, directing Respondents' answer, will be withdrawn.[4]

---

[3] The Court, however, stresses that its decision to direct transfer is based solely on Petitioner's filing of his instant petition in the forum of incorrect jurisdiction. No statement in this Opinion or the Order filed herewith shall be construed as this Court's position that Petitioner's challenges are substantively meritorious or that he should be entitled to equitable tolling.

[4] While it has been apparent to this Court that Petitioner's § 2254 application at bar was second/successive ab initio and, hence, fell outside this Court's subject matter jurisdiction, the Court found it warranted to direct Respondents' answer in light of the then-already-certified-for-resolution McQuiggin v. Perkins, 133 S. Ct. 1924 (2013). In McQuiggin, an inmate filed a § 2254 petition more than eleven years after his conviction became final; he was claiming he was innocent and received ineffective assistance of counsel during his trial, and he submitted three affidavits signed by witnesses that supported both his claims. The district court in McQuiggin found that, even if the affidavits could qualify as newly discovered evidence, the inmate could not qualify for equitable tolling since he obtained the last affidavit in 2002 but filed his petition only in 2008. The Sixth Circuit reversed, finding that, while the inmate's petition was untimely, his claim of actual innocence was per se sufficient to allow him litigation on the merits, as if his petition was timely. The Supreme Court vacated. On one hand, the Supreme Court rejected the State's blanket argument that all habeas petitioners seeking equitable tolling had to establish

An appropriate Order follows.

s/Renée Marie Bumb
RENÉE MARIE BUMB
United States District Judge

Dated: December 11, 2013

diligence to cross a federal court's threshold, regardless of whether or not they were asserting a convincing actual-innocence claim. On the other hand, the Supreme Court found that it was an error to adopt the per se rule and completely disregard the issue of timing from evaluating the reliability of the affidavits. In light of the distinctions between Petitioner's claim and that addressed in McQuiggin, the Court found it prudent to flesh out the parties positions prior to dismissing this matter for lack of subject matter jurisdiction and transferring it to the Court of Appeals upon construing the petition at bar as an application for leave to a second/successive § 2254 petition incorrectly filed in this District. However, since Petitioner has moved for transfer, the Court's order to answer has become superfluous. Thus, it will be withdrawn. That being said, the Court notes the difference between the affidavits submitted in McQuiggin and Petitioner's position based on a single hearsay statement, which amplified the timeliness concerns and introduced additional doubts as to its reliability in light of the McQuiggin holding.